IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 30, 2007

STATE OF TENNESSEE v. MARCUS L. BRANNER

Appeal from the Criminal Court for Knox County
No. 67840 Richard R. Baumgartner, Judge

No. E2006-00939-CCA-R3-CD - Filed May 31, 2007

The defendant, Marcus L. Branner, was convicted by a Knox County Criminal Court jury of second degree murder of Michael Gardner, a Class A felony, attempted second degree murder of Richard Cagle, a Class B felony, and attempted second degree murder of Charles McGinnis, a Class B felony. He was sentenced to twenty-four years as a violent offender for the murder and eleven years as a Range I offender for each of the two attempted murders, and the sentences were imposed concurrently. In this attempt at a delayed appeal, he argues that the evidence was insufficient to support his convictions. We do not reach the merits of the defendant's appeal because we are without jurisdiction to do so. Thus, we dismiss the appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

J. Liddell Kirk, Knoxville, Tennessee, for the appellant, Marcus L. Branner.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Randall E. Nichols, District Attorney General; and G. Scott Green and Deborah Herston, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Because this case purports to be a delayed appeal, its procedural history is noteworthy. The defendant's crimes occurred in 1998, and the case was tried in 2001. The defendant's convictions were entered August 2, 2001. No written motion for new trial appears in the record. On November 1, 2001, the petitioner's case was set for a hearing on a motion for new trial, but his trial counsel stated on the record that he was not moving for a new trial and was instead proceeding directly to an appeal in which he would raise sufficiency of the evidence. Neither the record of the case before us nor the records maintained by the clerk of the appellate courts reflects that the petitioner ever had a direct appeal of his conviction. On April 21, 2003, the defendant filed a pro se petition for delayed

appeal in the trial court, in which he alleged he had learned by letter from the appellate court clerk dated October 14, 2002, that trial counsel had not filed an appeal on his behalf, that he had not waived his right to a timely direct appeal, and that counsel had misled him about the status of a direct appeal. The record does not contain an order, transcript, or minutes reflecting the disposition of the April 21, 2003 petition. The defendant filed a second petition containing identical allegations on July 26, 2004. On November 29, 2005, the trial court appointed counsel, and counsel then filed a "Motion for Delayed Motion for New Trial and for Delayed Appeal" and a "Motion for New Trial or for Judgment of Acquittal." Court minutes from April 16, 2006, reflect that after a hearing, the trial court denied "the Defendant's Motion for New Trial and for Delayed Appeal." The defendant filed a notice of appeal on May 9, 2006.

The issue with which this court is immediately confronted is that of jurisdiction. For a variety of reasons, we conclude that we do not have jurisdiction to consider the merits of a delayed direct appeal.

First, the record reflects that the petitioner filed a pro se petition for post-conviction relief on April 21, 2003. The petition itself was filed outside the one-year statute of limitations for filing post-conviction claims, although it makes allegations which, if taken as true, could extend the time for filing the petition. Absent a finding that the statute of limitations has been tolled, however, the courts are without jurisdiction to adjudicate an otherwise untimely post-conviction petition on its merits. T.C.A. § 40-20-102(b). In any event, the record does not reflect whether the court ever ruled on that petition, and in order for this court to have jurisdiction, there must be a final judgment entered in the trial court. See Tenn. R. App. P. 3(b); see also T.C.A. § 40-30-113(b).

Likewise, the July 26, 2004 petition appears to have been the petitioner's second attempt to obtain post-conviction relief. The statute allows for only one petition. T.C.A. § 40-30-102(c). Even if the record reflected a final adjudication of the 2003 petition, the 2004 petition does not allege any of the grounds allowed for reopening the 2003 petition. See id. § 40-30-117. Further, the record does not reflect that the trial court treated the 2004 petition as a motion to reopen the 2003 petition. Thus, we are without jurisdiction to consider a second petition, given that statute's specific directive that a petitioner be allowed only one post-conviction petition. See id. § 40-30-102(c).

Additionally, despite the fact that the trial court held a motion for new trial hearing, the record does not contain any order of the trial court finding that the petitioner was entitled, as a matter of post-conviction relief, to a belated motion for new trial. See id. § 40-30-113(a)(3). Absent some showing in the record that the trial court granted the defendant the opportunity to make an untimely motion for new trial as a function of post-conviction relief, we must conclude that the proceeding which took place was no more than a hearing on an untimely motion, which the trial court was without jurisdiction to conduct. See id.; Tenn. R. Crim. P. 33(b), 45(b)(3); State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997) ("A trial judge does not have jurisdiction to hear and determine the merits of a motion for a new trial that has not been timely filed."). It follows, then, that we are likewise without jurisdiction to consider the merits of an appeal from the trial court's extra-jurisdictional ruling on that motion.

Further, nothing in the record before us reflects that the trial court granted a delayed appeal. Neither the court's orders, court minutes, nor transcripts contain an affirmative grant of a delayed appeal. In fact, the court minutes reflect that the "Defendant's Motion for New Trial and for Delayed Appeal . . . is hereby DENIED." (Emphasis added.) Nevertheless, the petitioner has proceeded in this court as if the trial court granted him a delayed appeal despite the court minutes to the contrary. Absent a grant of a delayed appeal, we have no jurisdiction to consider the merits of the petitioner's issue.

The record before us does not present a case in which a delayed appeal has been placed properly within the jurisdiction of this court. In consideration of the foregoing and the record as a whole, the appeal is dismissed.

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JOSEPH M. TIPTON, PRESIDING JUDGE